No. 17-647

IN THE

# Supreme Court of the United States

ROSE MARY KNICK,

*Petitioner*,

*v.*

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

*Counsel for Amicus Curiae*
John Pagliaro
*Counsel of Record*
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Tel.: (617) 695-3660
johnpagliaro@nelfonline.org

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## INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF believes that the rights of private property are not second-class constitutional rights. The immense expansion of regulatory law that has taken place at all levels of government has adversely affected the exercise of those rights, however. Since its founding, NELF has staunchly supported property owners in their efforts to vindicate their Fifth Amendment rights against these and other kinds of encroachment by government.

NELF appears as an amicus in the present case because it believes that a grave injustice was done to those rights in 1985, when this Court announced the

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3(a), NELF states that both Petitioner and Respondents have filed written consents to the filing of amicus briefs in support of either or neither party. The consents were docketed on April 30 and May 2, respectively.

so-called state litigation ripening requirement for federal takings claims, in its decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). For the reasons set out here by NELF and elsewhere by the Petitioner, NELF believes that the decision to recognize this requirement is ill reasoned and poorly supported by precedent. It rests on a series of confusions, perhaps the most fundamental of which is the confusion of just compensation with a money damages remedy obtainable in court.

The *Williamson County* ripening requirement has caused turmoil among property owners and consternation among lower courts and legal commentators, as this Court has been made aware by a host of petitions filed since 1985 earnestly asking it to reconsider the requirement. NELF welcomes the Court's decision to do so now, and it submits this brief in order to assist the Court in its reconsideration.

## SUMMARY OF THE ARGUMENT

The "adequate process" for obtaining just compensation which is discussed in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984), and which is fundamental to the *Williamson County* Court's reasoning, does not support the state litigation requirement because it refers to private negotiations and arbitration, not to court proceedings. In addition, the process determined only the *extent* of any taking that occurred, and so cannot support a state litigation requirement that hinges on a separate takings issue, i.e., the denial of just compensation.

For the same two reasons, *Monsanto* does not support the next step in *Williamson County* Court's reasoning, either, i.e., that federal litigation under the Tucker Act ripens federal takings claims for just compensation. Litigation under the Tucker Act cannot *ripen* a takings claim because its purpose is to *resolve* such claims. Least of all could Tucker Act litigation ripen a takings claim for later litigation under the Tucker Act, which is the mandatory vehicle for pursuing such claims against the United States. Hence, the attempted federal analogy fails to support the supposed ripening effect of state litigation.

Despite clearly stating earlier in *Williamson County* that exhaustion of remedies is not required for a 42 U.S.C. § 1983 takings claim, the Court required precisely that when it set out the state litigation requirement. It did so in the mistaken belief that a state court's final judgment denying money damages is merely the judicial analog of local government's failure to pay just compensation. In adopting that belief, the Court brought to a head its blurring of the distinction between ripening a claim and judicially resolving it.

Underlying the reasoning of *Williamson County* is the unexamined assumption that payment of just compensation under the Takings Clause is a remedy. But payment of just compensation is not a remedy; it is a constitutional limiting condition placed upon the power of government to take. Only when just compensation has *not* been paid does there arise an injury requiring a remedy. Hence, post-deprivation procedures regulating the timing, amount, and manner of payment of *just compensation* do not support the Court's conclusion that a state court post-deprivation lawsuit for a *money damages*

*remedy* ripens a takings claim by finally determining that the "State" will not pay just compensation.

## ARGUMENT

> "This is a case one can get easily confused on[,] I might say." Justice William J. Brennan, at oral argument of *Williamson County*[2]

### I. The *Williamson County* Court's Reliance On *Monsanto*'s Nonjudicial "Process" Does Not Support A Role For Courts In Ripening Takings Claims.

*Williamson County's* state litigation ripening requirement rests on a few broad brushstrokes of reasoning. In the first, the Court wrote:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.

*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018, n.21 (1984)).

*Monsanto*, a decision which Justice Harry A. Blackmun wrote only twelve months before he wrote the *Williamson County* opinion, was a singularly bad

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[2] Transcript of Oral Argument, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (No. 84–4), available at https://www.oyez.org/cases/1984/84-4 (last accessed May 29, 2018).

place for him to look for support for a state litigation ripening requirement, for in *Monsanto* the "adequate process" was not judicial. In fact, that process was created by Congress specifically to eliminate, to the extent possible, the need for litigation.

The facts of *Monsanto* bear this out. In *Monsanto*, the Court addressed the question of whether a taking of property without just compensation arose from the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 467 U.S. at 1000–01. The act allowed certain trade secrets filed with the EPA by pesticide registrants to be used by their competitors when the latter sought to register their own pesticides. *Id.* at 992–93. Monsanto Company complained that the act thereby effected a taking of its intellectual property. However, FIFRA also required prior registrants like Monsanto and their later-filing competitors to work out, either through negotiations or through mandatory, binding, unreviewable arbitration, a fair price to be paid for any trade secrets so used. *Id.* at 994–95.

The FIFRA "process" therefore involved proceedings for the nonjudicial valuation of property and for the payment of a fair price for using it; the process did not involve litigation over the threshold question of whether there was any takings liability in the first place, as is the situation in the typical regulatory takings case, such as the present case or *Williamson County* itself. Only after FIFRA's negotiations/arbitration procedures were employed and only to the extent that Monsanto believed that the resulting compensation did not represent a fair valuation of its trade secrets was the company allowed to pursue a Tucker Act claim against the federal government for any shortfall. *Id.* at 1013 & n.16, 1018 & n.21.

Hence, under *Monsanto's* own highly exceptional facts, it might be true to say that "if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County*, 473 U.S. at 194–95 (quoting *Monsanto*). But it is very difficult to see how *Monsanto's* private, nonjudicial valuation procedures support a requirement that a takings plaintiff must ripen his federal claim by engaging in state litigation over the question of liability. The only sense in which Monsanto's takings claims had been dubbed "premature" and not "ripe" by the Court was that "no arbitration has yet occurred" and so the Court "cannot preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation, thus nullifying any claim against the Government." *Monsanto*, 467 U.S. at 1013 & n.16, 1020.

Significantly, in *Monsanto* the Court called FIFRA's unusual negotiation/arbitration scheme a "precondition" that had to be fulfilled in order "to determine the *extent* of the taking that has occurred." *Id.* at 1018 & n.21 (emphasis added). If that was its function, then it is clearly much more akin to *Williamson County's* final decision-making requirement for ripening a claim than to the state litigation one. *See Williamson County*, 473 U.S. at 191 n.12 (final decision-making requirement: "it is impossible to determine the *extent* of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations"), 195 (state litigation requirement: "the State's action here is not 'complete' until the State *fails to provide adequate compensation* for the taking") (emphasis added).

Hence, the Court's own view of FIFRA's "adequate process" in *Monsanto* undercuts what the Court sought to accomplish twelve months later when it cited that decision, i.e., to find support for using state litigation to ripen a federal takings claim based on a failure to pay just compensation.

Apparently intending to illustrate by an example the statement it just made, the *Williamson County* Court goes on to write, again in reliance on *Monsanto*:

> Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491.

473 U.S. at 195 (citing *Monsanto*, 467 U.S. at 1016–20).

This step in the Court's reasoning is beset with problems too. First, the pages cited from *Monsanto* do not refer to using Tucker Act litigation to ripen a takings claim; in fact, they specifically state that it is FIFRA's negotiation/arbitration process that ripens a claim for later Tucker Act litigation. *See Monsanto*, 467 U.S. at 1018 ("precondition to a Tucker Act claim").

Second, the statement literally makes no sense. Takings claims against the federal government must be brought under the Tucker Act, and needless to say they must be ripe when brought. So this enigmatic statement seems to envisage a ripe, and yet somehow not truly ripe, Tucker Act claim failing on the merits in federal court and thereby somehow ripening a later, identical Tucker Act claim that will

enter the federal court through the front door while the first Tucker Act claim is being ushered out the back door. How could that possibly be? Litigation under the Tucker Act is the congressionally mandated means to *resolve* such takings claims; it does not *ripen* those claims, least of all so that the same litigation can be played out all over again in federal court with a retread of the first, failed Tucker Act claim.[3]

Having begun to blur the distinction between ripening a claim and judicially resolving it, and on that basis having established, to its own satisfaction at least, a role for federal courts in ripening takings claims, the *Williamson County* Court next turned its attention to the ripening role of state litigation.

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[3] NELF is not the first to notice the circularity of the Court's statement. *See* Michael M. Berger, *Anarchy Reigns Supreme*, 29 Wash. U. J. Urb. & Contemp. L. 39, 57–58 (1985) ("The Court cannot have meant what it said. . . . Use of the Tucker Act is not a *prerequisite* to another remedy, it *is* the remedy.") (original emphasis); Brief Amici Curiae for Elizabeth J. Neumont et al., 2005 WL 176429, at 12, *San Remo Hotel LP v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04-340) (absurd to say that "an owner's Tucker Act suit for just compensation would be 'premature' until the property owner had brought a Tucker Act suit for just compensation"). The Court's statement would make perfect sense in the context of *Monsanto* itself if "FIFRA" were substituted for the "Tucker Act," for FIFRA's negotiation/arbitration process may be a prelude to a claim against the federal government, as we have noted. But we have also observed that the process is fundamentally dissimilar to the state litigation requirement in that it only fixes the extent of a taking and is not judicial. The nonsensical substitution of the Tucker Act for FIFRA is an indication of how badly *Monsanto* had to be distorted to support *Williamson County's* reasoning.

## II. The *Williamson County* Court Failed To Adhere To Its Own Distinction Between Final Decision-Making That Ripens A Claim And Remedial Court Proceedings That Resolve A Claim.

The Court next presented a second illustration of ripening, this one dealing with takings claims brought against a state entity rather than against the federal government. We now come to the foundational statement of the state litigation requirement.

> Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

*Williamson County*, 473 U.S. at 195. In the following paragraph, the Court restated this key point:

> [B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

*Id.* Before a federal claim can be brought in federal court, therefore, the Court held that takings claims must be ripened by state litigation. Pointing out that Tennessee law permits inverse condemnation actions to be brought in state court for takings

claims, the Court ruled that the bank "has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its [federal] taking claim is premature." *Id.* at 196–97.

While this chain of reasoning does not suffer from the circularity of the earlier statement about Tucker Act claims, it now completely blurs the distinction between what courts do and what local state agencies, boards, commissions, counties, and municipalities do when the latter take and do not justly compensate. *See* Michael M. Berger and & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 695 (2004) (original emphasis) ("[T]he festering problem at the core of *Williamson County* is *blurring the state legal system with the local agency defendant* . . . .").[4]

Oddly, at the conclusion of its discussion of the final decision-making requirement for ripening a claim, the *Williamson County* Court drew a distinction between that requirement and a requirement to exhaust remedies.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at

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[4] Arguably, underlying that "festering problem" is a more fundamental one, i.e., the Court's confusion of the just compensation that the county did not pay with the money damages the bank was required to seek from the state court as remedy for that failure to pay just compensation. *See infra* pp. 15–23.

> a definitive position on the issue that *inflicts an actual, concrete injury*; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and *obtain a remedy* if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 193 (emphasis added).

To clarify the distinction, the Court noted that while the final decision rule required the bank in *Williamson County* to follow procedures for obtaining variances to determine definitively the extent to which its land development would be curtailed by local regulations, the bank "would not be required to exhaust" remedial procedures for its 42 U.S.C. § 1983 takings claim. *Id.*

> While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, . . . respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are *remedial*.
>
> . . . .
>
> Resort to those procedures would result in a *judgment* whether the Commission's actions violated any of respondent's *rights*. In contrast, resort to the procedure for obtaining variances

> would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.

*Id.* (emphasis added).[5]

Thus the Court recognized a critical distinction, one to which it failed to adhere a page later. Final agency decision-making is a "conclusive determination" of the extent to which the government would allegedly take; it occurs outside of court and, if unaccompanied by just compensation, it "inflicts an actual, concrete injury." By contrast, if a court reviews such a decision, the proceeding is a remedial one, wherein "rights" are settled by a "judgment" and a "remed[y]" is given. Plainly, the former proceeding ripens a claim, and the latter resolves it; the difference is categorical.

Unhappily, the Court immediately set about undermining that difference. When the Court turned to a "second reason the taking claim is not yet ripe," it did a volte-face, for there we are told, as we have seen, that the second reason the bank's claim remained unripe was that the bank had not sought a *remedy* in state court.[6] *Id.* at 194–97. *See*

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[5] We note that, on the facts of *Williamson County* itself, the bank had no need for variances from the new regulations because it had prevailed in the lower courts on its argument that it had only ever been lawfully subject to the old regulations. *See Williamson County*, 473 U.S. at 182–84.

[6] In a footnote the Court justified this inconsistency on the grounds that takings claims are unique, an explanation that rests on the erroneous assumption that just compensation is denied, and the associated takings claim becomes ripe, only

—*continued on next page*—

*also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) ("Damages for a constitutional violation are a legal remedy."). In other words, the state litigation requirement gives to a state court's *remedial* proceedings the same power to ripen a federal takings claim as that possessed by the final agency decision that "inflicts [the] actual, concrete injury" by taking without just compensation. Essentially, the *Williamson County* Court treated a state court's final judgment denying money damages as if it were simply the judicial analog of the local government's failing to pay just compensation. Just compensation or compensatory damages—the Court saw no real difference. *See Williamson County*, 473 U.S. at 195 n.14 ("Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation.").

Expressed more exactly, *Williamson County* confuses a local government entity's denial, as party defendant, of any liability to pay compensation with a state court's judgment as adjudicator of the dispute between the local government entity and the property owner. As pled by the bank, it was the county's denial as taker and as party defendant that created the violation of the Takings Clause, i.e., "inflict[ed] an actual, concrete injury." For similar reasons, the Court's reference to "the State's action" not being "complete" until the "State" fails to provide adequate compensation for the taking by a court judgment compounds the confusion. It was not the

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once a money damages remedy has been denied by a court. *See* 473 U.S. at 494 n.13. For the underlying confusion between just compensation and a money damages remedy, see *infra* pp. 15–23.

"State," no more than it was the state court, whose actions were alleged to have taken the property interest of the bank, and it was not the "State," no more than it was the state court, that refused to pay just compensation; it was the county and the organs of county government that did both.

By veering from the sound, fundamental distinction it articulated just moments before, the Court unwittingly put in place an erroneous ripening requirement that would prove to be the graveyard of countless takings claims. Unlike the final decision-making requirement, state litigation culminates in a final judgment, which implicates the claim-extinguishing principles of claim and issue preclusion and the Full Faith and Credit statute (28 U.S.C. § 1738). That fact should have raised a red flag alerting the Court that it was not laying down a procedure for ripening a takings claim for federal litigation, but rather for extinguishing it. A state court judgment denying a plaintiff relief on a state takings claim adds nothing to the ripeness of a federal claim, and in fact, under *Williamson County*, it imperils such a claim.

During oral argument in *San Remo Hotel, LP v. City and County of San Francisco*, 545 U.S. 323 (2005), Justice Sandra Day O'Connor said:

> [F]rankly, it isn't clear to me that the Court ever contemplated just cutting off any determination in Federal court of takings claims in the way that it seems to work out by application of *Williamson County*. . . . So now we're faced with the consequences of that, and it looks to me like the lower courts have run pretty far with *Williamson*

> *County*. So what's a takings claimant supposed to do?[7]

It is clear to NELF what this Court should do. *Williamson County* confuses both the "State" and the state courts with the local agencies, boards, commissions, towns, etc., that make the only decisions that count for ripeness, i.e., the final decision to take and the decision not to pay just compensation. It also muddles the huge, legally consequential difference between local government's refusal to pay just compensation and a state court's final judgment not to award a damages remedy for an alleged taking. *See infra* pp. 15–23. This Court should therefore abandon the state litigation ripening requirement. It was ill supported and badly reasoned, and its effect on the defense and vindication of constitutionally protected property rights has been uniformly pernicious.

## III. *Williamson County*'s Reasoning Stems From A Confusion That Has Developed In Takings Law.

As we have suggested, underlying the *Williamson County* Court's reasoning is a confusion between the just compensation owed by government and a money damages remedy awarded by courts. These are not the same, and *a fortiori* neither are government's refusal to pay just compensation and a state court's denial of a money damages remedy to a property owner on a takings claim. Once these distinctions

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[7] Transcript of Oral Argument, *San Remo Hotel LP v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04–340), available at http://www.scotussearch.com/casefiles/719#1 (last accessed April 30, 2018).

become blurred, all "post-deprivation" state procedures that involve money start to look a lot alike, as they apparently did to the *Williamson County* Court.[8] *See* J. David Breemer, *Dying on the Vine: How a Rethinking of "Without Just Compensation" and Takings Remedies Undercuts* Williamson County's *Ripeness Doctrine*, 42 Vt. L. Rev. 61, 66 (Fall 2017).

Payment of just compensation has long been recognized by this Court to be a *limiting condition* placed by the Fifth Amendment on the power of government to take private property for public use.[9]

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.

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[8] But the Court also found support in a post-deprivation due process case where the issue did not center on a failed obligation to pay money. 473 U.S. at 195 (discussing *Parratt v. Taylor*, 451 U.S. 527 (1981)). Admitting in a footnote that the analogy was an "imperfect" one, the Court sought refuge once again, *see supra* n.6, in the "special nature" of just compensation, *see* 473 U.S. at 195 n.14.

[9] The Fifth Amendment applies to state governments through the Fourteenth Amendment. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (citing *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897)).

*First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987).[10]

It follows that when the condition of paying just compensation is fulfilled, the taking is lawful and inflicts no injury. *See Williamson County*, 473 U.S.

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[10] *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950–51 (2017) (Roberts, C.J., dissenting) (Takings Clause places "condition" of just compensation on government's power to interfere with property rights); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S.Ct. 1409, 1409–10 (2016) (Thomas, J., dissenting from denial of certiorari) (citing *First English*); *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (Fifth Amendment "imposes two conditions on the exercise" of taking power—public use and just compensation); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("[J]ust compensation ... conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs."); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) (just compensation "condition of the taking"); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 305 (1923) ("A necessary condition of the taking is the ascertainment and payment of just compensation."); *United States v. Lynah*, 188 U.S. 445, 471 (1903) (just compensation limitation imposed on power to take by Fifth Amendment); *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 238 (1897) ("condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner"); *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890) ("[Eminent domain] cannot be exercised except upon condition that just compensation shall be made to the owner[.]"); *United States v. Jones*, 109 U.S. 513, 518 (1883) (compensation requirement "is no part of the [eminent domain] power itself, but a condition upon which the power may be exercised"); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (Marshall, C.J.) (Takings Clause "a limitation on the exercise of power by the government").

at 195 n.13 ("no constitutional violation occurs until just compensation has been denied"); *Monterey*, 526 U.S. at 710, 718 ("The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. . . . Simply put, there is no constitutional or tortious [§ 1983] injury until the landowner is denied just compensation."). Hence, it is not any sort of remedy.

In contrast to the payment of just compensation, payment of money damages is the remedy given by a court when government has injured an owner by taking property without having paid just compensation. *See Monterey*, 526 U.S. at 710 ("[I]n a strict sense [the property owner] sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy.") The fact that the amount paid as just compensation and the amount recovered as money damages may be the same does not negate the legal distinction, though it has long promoted confusion between the two and a loose use of terminology. *See id.* at 718 ("[D]amages to which the landowner is entitled for this injury are measured by the just compensation he has been denied[.]"). The amount may be the same but it bears a very different legal character in the two situations for the reasons just given.

Hence, post-deprivation procedures geared to regulating the timing and manner of payment of just compensation and the ascertainment of its amount are not remedial in nature, in the sense of providing money damages for an injury as a court would. We first glimpse the *Williamson County* Court's confusion on this point in the following sentence:

> Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking.

473 U.S. at 194.

The quoted phrase is drawn the from *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890). There the post-deprivation "reasonable, certain and adequate provision for obtaining compensation" described the kind of procedures we have just mentioned, i.e., those regulating the constitutionally permissible manner of paying post-deprivation *just compensation* for an acknowledged taking, when the taker stands ready, willing, and able to pay it once the amount is fixed. *See Cherokee Nation*, 419 U.S. at 643–44 (where land was taken by eminent domain, prescribed post-deprivation procedures for obtaining just compensation are "amicable" negotiations or mandatory "appraisement of three disinterested referees," with right of review by court of amount appraised). The proceedings were not concerned with establishing the why of liability, but only with the how, how much, and when of the just compensation that was to be paid. Hence, in *Cherokee Nation* the phrase does not mean what the *Williamson County* Court used it to mean, i.e., that judicial procedures for obtaining money damages when there is a disputed taking are the exact legal equivalent of provisions for being paid just compensation, or conversely that being denied money damages by a court on a takings claim is the exact legal equivalent of the taker refusing to pay just compensation in the first place. The Court's

confusion is based on the unexamined and erroneous assumption that one form of "compensation" is as good as another for determining the ripeness of a claim for an uncompensated taking.

Just as the Court had to squeeze *Monsanto* to make it fit into *Williamson County*, the Court did the same when it applied to state litigation the expression "reasonable, certain and adequate provision for obtaining compensation." These terms may describe accurately *Cherokee Nation's* procedures for determining the amount of just compensation to be paid for the property taken, but when has liability litigation for money damages, with all its attendant risks, ever merited being called a "certain" method for obtaining compensation"?

This point is confirmed by another much-cited case, *Sweet v. Rechel*, 159 U.S. 380 (1895), in which there was also an acknowledged, undisputed taking authorized by legislative act, with just compensation being paid afterwards. In *Sweet*, which originated in Massachusetts, the question was what counted as a constitutionally permissible provision for being paid just compensation when it is paid post-deprivation. 159 U.S. at 400. The Court noted that the reasonable compensation required by the Massachusetts constitution was equivalent to the just compensation of the U.S. Constitution, and it proceeded to review the question first with reference to the Massachusetts constitution and then to the federal Constitution. It observed that in Massachusetts "'[p]ayment need not precede the seizure; but the means for securing indemnity must be such that the owner will be *put to no risk or unreasonable delay*.'" *Id.* at 401 (emphasis added) (quoting *Haverhill Bridge Props. v. County*

*Commissioners*, 103 Mass. 120, 124 (1869)). It noted further that Massachusetts requires "*prompt* and *certain* compensation," and that after valuation proceedings, the owner has an "*unqualified right to a judgment* for the amount of such damages." *Id.* at 402 (emphasis added).

Then the Court turned to the U.S. Constitution and declared, citing *Cherokee Nation*, "Substantially the same principles have been announced by this court when interpreting the clause of the constitution of the United States that forbids the taking of private property for public use without just compensation," including the principle that the amount of just compensation be "ascertained without undue delay" in post-deprivation proceedings. *Id.* at 402, 407. *See also Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) (citing *Cherokee Nation*) ("rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation"); 2 John Lewis, *A Treatise on the Eminent Domain in the United States* § 678 at 1163 & n.50 (3rd ed. 1909) (citing numerous cases, including *Cherokee Nation* and *Sweet*) (emphasis added) (just compensation need not precede entry, provided "some definite provision is made whereby the owner will *certainly* obtain compensation").[11]

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[11] "It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of *just compensation* is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment*, and there is *adequate provision for enforcing the pledge*." *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677

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Clearly, a statute permitting an owner to litigate liability in the hope of winning money damages for an uncompensated taking is not the kind of "provision" that could be reasonably described by any of the terms quoted approvingly in *Sweet* ("certain," "no risk," "prompt," etc.), as the history of modern regulatory takings cases bears out only too well.

Unfortunately, just as an earlier rule that payment of just compensation should precede or coincide with a taking yielded to the more practical rule that there must at least be in place at the time of the taking an "adequate provision" for later ascertaining and obtaining *just compensation* promptly and with certainty, so toward the end of the 19th Century courts laxly came to view laws allowing for recovery of a *money damages remedy* through post-deprivation suit as "provision[s]" of the same kind as that described in *Cherokee Nation*. *See* J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-25 (Spring 2003). *See also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 109-115 (1999). In addition to the courts' not infrequent failure to distinguish carefully between just compensation and a money damages remedy when

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(1923) (emphasis added) (citing *Sweet* among other sources). In *Joslin*, a statute made payment guaranteed and prompt in a number of ways. *See* 262 U.S. at 677–78.

they clearly intend only the former,[12] the 1887 passage of the Tucker Act likely encouraged federal courts, including this Court, to slip into this new way of viewing "compensation." *See* Breemer (2003), *supra*, at 222.

The confusion about what counts as a post-deprivation "adequate provision" for obtaining just compensation reached its destructive apogee once it became the basis of a ripeness requirement in *Williamson County*. Relying on an inapt quotation from *Cherokee Nation*, the Court mistakenly treated liability adjudication for a money damages remedy as just another procedure by which the "State" may give just compensation to a takings plaintiff. As a result, the requirement that plaintiffs litigate liability in state court has led, time and again, to a premature demise of their federal claims. This case provides the Court with an opportunity to dispel the confusion and to end the injustice.

## CONCLUSION

For the reasons stated above, the Court should announce the abandonment of the state litigation ripening requirement set out originally in this Court's decision in *Williamson County*.

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[12] *See, e.g., Bauman v. Ross*, 167 U.S. 548, 599 (1897) (if "damages" not paid, title remains in owners, because they cannot be "compelled to part with their lands without receiving just compensation").

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

*/s/ John Pagliaro*

John Pagliaro, Staff Attorney
*Counsel of Record*
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Telephone: (617) 695-3660
johnpagliaro@nelfonline.org

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